

BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

IN THE MATTER OF ENFORCEMENT
ACTION AGAINST

Marilou Rickert,
Respondent,

PDC CASE NO: 03-147

**MARILOU RICKERT'S
RESPONSE TO THE NOTICE OF
ADMINISTRATIVE CHARGES OF
THE DIRECTOR OF
COMPLIANCE OF THE PUBLIC
DISCLOSURE COMMISSION**

1. Introduction.

This is an enforcement action brought by the Director of Compliance (the Director) of the Public Disclosure Commission (PDC) of the State of Washington against Dr. Marilou Rickert on the complaint of State Senator Tim Sheldon of the 35th Legislative District. The Director alleges that Dr. Rickert, while a candidate for the State Senate, 35th Legislative District, in 2002, violated RCW 42.17.530 by sponsoring "with actual malice" "political advertising that contain[cd] a false statement of material fact about" Senator Sheldon, "a candidate for public office." RCW 42.17.530(1)(a). "Actual Malice" is defined in RCW 42.17.505(1) as "to act with knowledge of falsity or with reckless disregard as to truth or falsity." Violations of RCW 42.17.530 must be "proven by clear and convincing evidence." RCW 42.17.530(2).

RCW 42.17.530(1)(a), on its face, violates the First Amendment of the Constitution of the United States in that it infringes on the First Amendment's guarantee of free speech. Even were RCW 42.17.530(1)(a) not a facially unconstitutional restriction on speech, its application in the present case would be an unconstitutional infringement on the right of free speech. The Director's charges against Dr. Rickert should thus be dismissed in their entirety.

In addition to the Constitutional deficiencies of RCW 42.17.530(1)(a), at least as applied in the present case, the State has applied an incorrect standard for a finding of actual malice under

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1 RCW 42.17.530(1)(a) as defined in RCW 42.17.505(1) and has not met the clear and convincing
2 evidentiary burden required to prove that a violation of RCW 42.17.530(1)(a) has occurred. For
3 these additional reasons, the Director's charges against Dr. Rickert should be dismissed.

4 2. Respondent's Facts

5 Senator Tim Sheldon and Dr. Marilou Rickert were candidates for the position of State
6 Senator from Washington's 35th Legislative District in the November 5, 2002 General Election.
7 Senator Sheldon was the incumbent and was re-elected.

8 Between October 16, 2002 and October 28, 2002, Dr. Rickert sponsored a mailing that was
9 either mailed or delivered to most active voting households in the 35th District. The mailing
10 consisted of a brochure with information about the Green Party and her candidacy enclosed in a
11 wrapper, entitled "There IS a Difference," comparing Senator Sheldon's positions with her own on
12 various issues. Dr. Rickert sent the mailings out in batches over an extended period of time because
13 the mailings had to be prepared by volunteers and because she had to raise the money to pay for
14 mailings.

15 Dr. Rickert had sources for all of the statements made about Senator Sheldon. For the most
16 part, her sources were from the print media. Other sources included PDC records, records of the
17 Washington state legislature, statements made by Senator Sheldon himself at candidates forums that
18 they both attended and of which Dr. Rickert had direct knowledge, and information received from
19 Dave Wood, a lobbyist for Action for RHCs (Residential Habilitation Centers), an advocacy group
20 for services for the profoundly and severely developmentally disabled. Specifically, Mr. Wood
21 discussed Senator Sheldon's role in the closure of Mission Creek Youth Camp with Dr. Rickert over
22 lunch in June of 2002 and by telephone on at least one occasion thereafter.

23 All of the statements in the mailer about Senator Sheldon had to do with his activities as state
24 senator and senatorial candidate. At no point in her campaign for State Senator did Dr. Rickert make
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1 any statement or sponsor any advertising that contained any reference to Senator Sheldon's personal
2 life, his family, or his activities as PUD commissioner, Director of the Mason County Economic
3 Development Council, manager and part owner of Sheldon Properties, or any position or role other
4 than that of state senator and senatorial candidate.

5 The Friday before the election (November 1, 2002), Senator Sheldon telephoned Dr. Rickert
6 at her work place. He said that he had just been made aware of the mailing and that it was false and
7 misleading in its entirety. Initially, he took specific issue with the statement that [Senator Sheldon]
8 "wants to terminate people from Washington's Basic Health Plan." Dr. Rickert pointed out that
9 Senator Sheldon's position regarding termination of people from Washington's Basic Health Plan
10 had not only been reported in the press, but that he had twice advanced it at public forums at which
11 Dr. Rickert had been present.¹

12 After discussion, Senator Sheldon agreed that the statements about him in the mailer were
13 substantially true, with the single exception of the statement that he "voted to close a facility for the
14 developmentally challenged in his district." Senator Sheldon insisted that he voted against closure of
15 Mission Creek and specifically stated, in response to a question by Dr. Rickert, that he considers
16 himself "an advocate for the developmentally disabled." Dr. Rickert agreed to review the
17 information with her source (Dave Wood) and get back to Senator Sheldon.²

18 Dr. Rickert contacted Mr. Wood regarding Senator Sheldon's accusation that the statement
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20 ¹ On March 14, 2003, Senator Sheldon voted to pass SSB 5807, which would significantly restrict enrollment in
21 Washington's Basic Health Plan for both adults and children.

22 ² There is no indication Senator Sheldon made any attempt to contest Dr. Rickert's statement regarding his role in
23 the closure of Mission Creek, despite the fact that he had the resources and (even assuming that he only became
24 aware of the mailing two weeks after the beginning of its distribution) time to do so. Senator Sheldon collected
25 \$109,970 in campaign contributions, of which he surplused \$59,404.37. For an example of the speed with which a
political message can be aired, KMAS, Shelton's local radio station, taped an ad for Dr. Rickert's campaign on less
than two hours notice the Friday before the election and had it on the air in less than 24 hours. To the best of Dr.
Rickert's recollection, \$200 purchased six weekend airings of the ad.

1 that he "voted to close a facility for the developmentally challenged in his district" was false. She
2 received a verbal statement and an e-mail message from Mr. Wood to the effect that her only error
3 was reporting Mission Creek as a facility for the developmentally challenged rather than a youth
4 rehabilitation center³ and that Senator Sheldon's vote AGAINST his own party's budget sealed
5 Mission Creek's fate. Mr. Wood went on to say that "[t]wo Republican senators, Alex Deccio and
6 Shirley Winsley, saved or even expanded programs in their districts that they care deeply about.
7 They voted YES on the budget. [Senator Sheldon] could have done the same thing."

8 As Mr. Wood copied his email to Senator Sheldon and spoke directly with Senator Sheldon
9 about the Mission Creek matter the week following the election, Dr. Rickert did not contact Senator
10 Sheldon further about Mission Creek, although she did send him a card congratulating him on his re-
11 election.⁴

12 On the weekend following the election, Dr. Rickert received a letter from Senator Sheldon in
13 which he stated that "[y]our excuse that I want to terminate people ineligible to be enrolled from
14 BHP as somehow justified because, in your words, 'they are people, too' is truly lame." Senator
15 Sheldon also threatened to "pursue the issue with the PDC" if she did not provide him "with the date
16 and bill number of the legislation that . . . would have closed . . . 'a facility for the developmentally
17 challenged in his district and is advocating for the site to be turned into a prison.'"⁵ The letter was
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19 ³ Mission Creek has been variously described as a "youth rehabilitation center" (Dave Wood), a "medium security
20 Youth Camp for juveniles convicted of felony-level offenses" (Ken Brown, Fiscal and Contracts Manager, Juvenile
21 Rehabilitation Administration, Washington State Department of Social and Health Services), and a "prison facility
22 for juvenile offenders" (Senator Tim Sheldon), as well as a "facility for the developmentally challenged" (Dr.
23 Marilou Rickert). RCW 72.05.010 refers to Mission Creek Youth Camp as one of several named "residential state
schools, camps and centers" with the purpose of providing "for every child with behavior problems, mentally and
physically handicapped persons, and hearing and visually impaired children . . . such care, guidance and instruction,
control and treatment as will best serve the welfare of the child or person and society . . ."

24 ⁴ Senator Sheldon won re-election to the State Senate with 78.27% of the votes cast (29,221 to 8,109).

25 ⁵ "Youth Camp Could Be Resurrected as Prison," The Bremerton Sun, July 11, 2002, names Senator Sheldon as the
organizer of a meeting to discuss a proposal "to convert the recently closed Mission Creek Youth Camp into a

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1 followed by several phone calls from Senator Sheldon to Dr. Rickert's home over Veterans Day
2 weekend. On Veterans Day, Senator Sheldon voluntarily left a message on Dr. Rickert's voice mail
3 to the effect that he wanted her to write a letter to the press clarifying the matter.

4 Upon learning that Senator Sheldon had no objection to a wider public airing of the dispute,
5 and would actually welcome such an airing, Dr. Rickert immediately took the opportunity to both
6 correct any misunderstanding that may have been caused by her mailing, and also to inform
7 advocates for the developmentally disabled that Senator Sheldon may be sympathetic to their cause,
8 by sending a letter to the *Shelton-Mason County Journal*, *The Bremerton Sun*, *The Olympian*, and
9 Aberdeen's *The Daily World*. The letter was published in its entirety by the *Journal* on November
10 21, 2002, and in shortened form by the *Sun* on December 2, 2002, and the *Olympian* on December 9,
11 2002.

12 The weekend after Dr. Rickert sent her letter to the press, she received a second letter from
13 Senator Sheldon re-iterating his request that she clarify her statement in a letter to the press. Senator
14 Sheldon attempted to impose additional requirements by insisting that Dr. Rickert send the letter to
15 "all the daily and weekly newspapers in the 35th District" and that he "would have to agree to the
16 content of the letter." Dr. Rickert did not receive Senator Sheldon's second letter until after she
17 mailed her letter to the press, but she has asserted that she "would not have cooperated with an
18 attempt by a government official acting in his official capacity to impose a prior restraint on political
19 expression." Her belief that Senator Sheldon was acting in his official capacity as State Senator
20 when he demanded she send a letter to the press containing political content over which he would
21 have control is based on the fact that the e-mails Senator Sheldon sent in support of his statement
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24 minimum-security facility for men or women". Senator Sheldon is quoted as supporting the proposal because "it's a
25 good fiscal move by the state."

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1 that he voted against closure of Mission Creek were self-identified as having been circulated during
2 regular work hours among State Senate staff who researched the matter for him.

3 On November 18, Senator Sheldon filed a complaint with the PDC alleging violations of
4 RCW 42.17.530(1)(a). Dr. Rickert received a letter from the PDC in late December notifying her of
5 Senator Sheldon's complaint. Dr. Rickert has fully cooperated with the PDC's requests for
6 information. On May 5, 2003, the Director filed a "Notice of Administrative Charges," alleging that
7 "there is clear and convincing evidence that Marilou Rickert violated RCW 42.17.530(1)(a) with
8 reckless disregard as to truth or falsity when she distributed political advertising that made a false
9 statement of material fact about Senator Tim Sheldon."

10 3. Discussion

11 a. RCW 42.17.530 (1)(a) violates the First Amendment of the Constitution of the United
12 States.

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14 RCW 42.17.530(1)(a) states:

15 It is a violation of this chapter for a person to sponsor with actual malice [p]olitical
16 advertising that contains a false statement of material fact about a candidate for
17 public office. However, this subsection (1)(a) does not apply to statements made by a
18 candidate or the candidate's agent about the candidate himself or herself

19 RCW 42.17.530(1)(a) is a facially unconstitutional abridgment of free speech. The asserted intent of
20 the legislature to "provide protection for candidates for public office against false statements of
21 material fact sponsored with actual malice" (RCW 42.17.530, Note (3)) is inadequate to justify the
22 burden placed on political speech.

23 On June 11, 1998, the Supreme Court of the State of Washington held, in *State ex rel. Public*
24 *Disclosure Commission v. 119 Vote NO! Committee*, 135 Wash.2d 618, 957 P.2d 691, that RCW

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1 42.17.530(1)(a) facially violated the First Amendment of the United States Constitution. At the time
2 of the Court's decision, RCW 42.17.530(1)(a) read "[i]t is a violation of this chapter for a person to
3 sponsor with actual malice [p]olitical advertising that contains a false statement of material fact."6

4 The reasoning of the majority, in an opinion authored by Justice Sanders, with citations
5 omitted, follows:7

6 The constitutional guarantee of free speech has its "fullest and most urgent
7 application" in political campaigns. Therefore, the State bears a "well-nigh
8 insurmountable" burden to justify RCW 42.17.530(1)(a)'s restriction on political
9 speech. This burden requires the court to apply "exacting scrutiny" to RCW
10 42.17.530(1)(a). Exacting scrutiny will invalidate the statute unless the State
11 demonstrates a compelling interest that is both narrowly tailored and necessary. Such
12 burdens are rarely met.

13 *119 Vote NO!*, 135 Wash.2d at 623-624.

14 The State asserts it may prohibit false statements of fact contained in political
15 advertisements. This claim presupposes the State possesses an independent right to
16 determine truth and falsity in political debate. However, the courts have "consistently
17 refused to recognize an exception for any test of truth--whether administered by judges,

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19 6 While a majority of Justices deciding *119 Vote NO!* agreed that RCW 42.17.530(1)(a) as then written violated the First
20 Amendment of the Constitution, Justice Madsen wrote a separate, concurring opinion, which was joined by Justice
21 Alexander, indicating that they were deciding the issue only in the context of a statement made regarding an initiative
22 measure, and that they believed the statute might withstand Constitutional challenge in the context of statements about
23 political candidates. *119 Vote No!*, 135 Wash.2d at 635, Madsen, J., concurring. Four Justices disagreed that RCW
24 42.17.530(1)(a) as then written violated the First Amendment. Following the decision, the Legislature amended RCW
25 42.17.530(1)(a) to read "[i]t is a violation of this chapter for a person to sponsor with actual malice [p]olitical advertising
26 that contains a false statement of material fact about a candidate for public office. However, this subsection (1)(a) does
27 not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself." In
28 amending the statute, the Legislature noted that "a review of the opinions indicates that a majority of the supreme court
may find valid a statute that limited such a prohibition on sponsoring with actual malice false statements of material fact
in a political campaign to statements about a candidate in an election for public office." (RCW 42.17.530, Note (2))

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1 juries, or administrative officials--and especially one that puts the burden of proving truth
2 on the speaker."

3 *Id.* at 624-625

4 Rather, the First Amendment operates to insure the public decides what is true and
5 false with respect to governance. In *Meyer[v. Grant]*, 486 U.S. 414, 419-420, 108
6 S.Ct. 1886, 100 L.Ed.2d 425 (1988)] the Supreme Court explained:

7 The very purpose of the First Amendment is to foreclose public
8 authority from assuming a guardianship of the public mind.... In this
9 field *every person* must be his own watchman for truth, because the
10 forefathers did not trust any government to separate the true from the
11 false for us.

12 Particularly in the religious and political realms, "the tenets of one man ... seem the
13 rankest error to his neighbor." Therefore, the Supreme Court has recognized that to
14 sustain our constitutional commitment to uninhibited political discourse, the State
15 may not prevent others from "resort[ing] to exaggeration, to vilification of men who
16 have been, or are, prominent in church and state, and *even to false statement.*" *Id.*
17 (emphasis added). At times such speech seems unpalatable, but the value of free
18 debate overcomes the danger of misuse. For even false statements make valuable
19 contributions to debate by bringing about "the clearer perception and livelier
20 impression of truth, produced by its collision with error."

21 *Id.* at 625

22 Specifically, the First Amendment prohibits the State from silencing speech it
23 disapproves, particularly silencing criticism of government itself. Threats of coerced
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25 7 For the Board's convenience, a copy of *119 Vote NO!* is included with the Respondent's pleadings.

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1 silence chill uninhibited political debate and undermine the very purpose of the First
2 Amendment.

3 *Id.* at 626.

4 [The Founders of the nation] believed that freedom to think as you will and speak as
5 you think are means indispensable to the discovery and spread of political truth....
6 Believing in the power of reason as applied through the public discussion, they
7 eschewed silence coerced by law--the argument of force in its worst form. The State
8 cannot "substitute its judgment as to how best to speak for that of speakers and
9 listeners; free and robust debate cannot thrive if directed by the government." "For
10 speech concerning public affairs is more than self-expression; it is the essence of self
11 government."

12 *Id.*

13 The majority opinion in *119 Vote NO!* reasoned that RCW 42.17.530(1)(a) would
14 infringe upon protected speech whether applied to initiative measures or to political
15 candidates:

16 Instead of relying on the State to silence false political speech, the First Amendment
17 requires our dependence on even more speech to bring forth truth. In the political
18 context, a campaign's factual blunder is most likely noticed and corrected by the
19 campaign's political opponent rather than the State. . . . the Supreme Court has
20 refused to recognize the possibility of "an eleventh-hour anonymous smear
21 campaign" as enough to justify a restriction on speech. Moreover, a well-publicized,
22 yet bogus, complaint to the PDC on election eve raises the same concern. Therefore,
23 "[t]he preferred First Amendment remedy of 'more speech, not enforced silence' thus
24 has special force." Underlying our dependence upon more speech is the
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1 presupposition "that right conclusions are more likely to be gathered out of a
2 multitude of tongues, than through any kind of authoritative selection. . . ."

3 *Id.* at 626-627

4 RCW 42.17.530 coerces silence by force of law and presupposes the State will
5 "separate the truth from the false" for the citizenry. . . . The First Amendment exists
6 precisely to protect against laws such as RCW 42.17.530(1)(a) which suppress ideas
7 and inhibit free discussion of governmental affairs.

8 *Id.* at 627

9 The majority's fears that RCW 42.17.530(1)(a) might be used by public officials to silence
10 criticism of their performance in office are illustrated in the present case. When Senator Sheldon
11 first contacted Dr. Rickert about her mailing, he did not immediately identify the allegedly false
12 statement that he "voted to close a facility for the developmentally challenged in his district" as the
13 source of his indignation. Rather, he was resentful that Dr. Rickert had criticized him at all. His
14 attempt to impugn the truthfulness of her advertising was to take issue with her statement that he
15 wanted "to terminate people from Washington's Basic Health Plan." Only after ascertaining that Dr.
16 Rickert's statement was thoroughly documented and that she had the documentation within reach did
17 he proceed to other statements in the mailer, eventually hitting on the statement regarding his lack of
18 support for services for the developmentally disabled as the point of weakness. Senator Sheldon's
19 complaint to the PDC is blatant retaliation for his opponent's criticism and has nothing whatever to
20 do with the ostensible purpose of RCW 42.17.530(1)(a), to protect candidates for political office
21 from malicious lies.

22 Having established that RCW 42.17.530(1)(a) infringed upon political speech, the Court in
23 119 *Vote NO!* turned its attention to the state interest served by the statute and determined that RCW
24 42.17.530(1)(a) does not serve a compelling state interest.

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1 Because RCW 42.17.530(1)(a) infringes upon protected speech, the court must apply
2 "exacting scrutiny." The State bears the "well-nigh insurmountable" burden to prove
3 a compelling interest that is *both* narrowly tailored and necessary to achieve the
4 State's asserted interest. States rarely meet this heavy burden.

5 *Id.* at 628

6 Noting that "the State relies heavily on defamation cases to prove a compelling interest to
7 justify intrusion into public debate," the Court distinguished defamation cases from actions under
8 RCW 42.17.530(1)(a) by pointing out that "by its nature defamation concerns statements made by
9 one person against another and is designed to protect the property of an individual in his or her good
10 name." RCW 42.17.530(1)(a), however, "restricts political speech absent the competing interest
11 present in defamation cases, and, unlike a defamation suit, creates a cause of action for the
12 government to pursue against a private person." *Id.* at 628-630.

13 If Senator Sheldon truly believes he has been defamed by Dr. Rickert's statement, he may
14 bring an action on his own behalf for defamation and recover compensation upon showing that the
15 statement in question was false, that the statement was unprivileged, that the publication of the
16 statement was Dr. Rickert's fault, and that the statement damaged Senator Sheldon. *See, e.g.,*
17 *Herron v. King Broadcasting Company*, 112 Wash.2d 762, 768, 776 P.2d 98 (1989); *Alpine*
18 *Industries, Computers, Inc. v. Cowles Publishing Company*, 114 Wash.App. 371, 57 P.3d 1178
19 (2002). As Senator Sheldon is a public figure and the alleged defamation concerns his public duties,
20 he must also show that Dr. Rickert acted with malice. *Herron*, 112 Wash.2d at *Id.* It is not only
21 unnecessary for the state to provide additional protection for Senator Sheldon, it is improper for the
22 state to create a public cause of action against a private citizen for this purpose.

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24 In addition, as shown in the present case, the current RCW 42.17.530(1)(a), no less than its
25 predecessor, "may be manipulated by candidates to impugn the electoral process rather than

1 promote truthfulness." *119 Vote NO!*, 135 Wash.2d at 631. "When the State 'directly hampers
2 the ability of a party to spread its message and hamstrings voters seeking to inform themselves
3 about the candidates and the campaign issues,' it has adopted a 'highly paternalistic approach' by
4 'limiting what people may hear ...' This approach renders such a law constitutionally suspect."
5 *Id.* at 632, quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109
6 S.Ct. 1013, 103 L.Ed.2d 271 (1989).

7 The compelling interest claimed by the State, in the present case no less than in *119 Vote*
8 *NO!*, "is patronizing and paternalistic. It assumes the people of this state are too ignorant or
9 disinterested to investigate, learn, and determine for themselves the truth or falsity in political
10 debate, and it is the proper role of the government itself to fill the void." *119 Vote NO!*, 135
11 Wash.2d at *Id.* In the present case, where information was readily available whereby citizens
12 could have decided for themselves whether they believed Senator Sheldon voted for or against the
13 closure of a facility for the developmentally challenged in his district, this assumption is, as it was
14 in the *119 Vote NO!* case, "especially flawed." *Id.* As applied here, as in *119 Vote NO!*, RCW
15 42.17.530(1)(a) is "pure censorship, allowing government to undertake prosecution of citizens
16 who, in their view, have abused the right of political debate." *Id.*

17 As amended, and as applied in the present case, RCW 42.17.530(1)(a), to paraphrase the
18 majority opinion in *119 Vote NO!*, chills political speech, usurps the rights of the electorate to
19 determine the merits of political candidates without fear of government sanction, and lacks a
20 compelling state interest in justification. *Id.*

21 b. The State has applied an incorrect standard for a finding of actual malice.

22 To prove a violation of RCW 42.17.530(1)(a), the State must show that the statement
23 complained of was made with "actual malice." "Actual malice," for purposes of RCW 42.17.530
24 through RCW 42.17.540 is defined as "to act with knowledge of falsity or with reckless disregard as
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1 to truth or falsity." RCW 42.17.505(1). Caselaw applying this standard in the context of an action
2 under RCW 42.17.530(1)(a) is unavailable. However, RCW 42.17.505(1)'s definition of "actual
3 malice appears identical to that applied in defamation cases under U.S. and Washington law. See,
4 e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725-726, 11 L.Ed.2d
5 686, 95 A.L.R.2d 1412 (1964); *Herron*, 112 Wash.2d at 775; *Alpine Industries*, 114 Wash.App. at
6 394.

7 The Director concludes that Dr. Rickert's statement that Senator Sheldon "voted to close a
8 facility for the developmentally challenged in his district" was made with actual malice because:

9 Ms. Rickert made no effort to ascertain the authenticity of her statements. She could
10 have easily determined the truth of Senator Sheldon's voting record on this issue to
11 find out whether Senator Sheldon voted for or against the Legislature's 2002 budget
12 that closed Mission Creek Youth Camp. She simply made no effort to do so. In
13 addition, Ms. Rickert should have known or could have easily determined whether
14 Mission Creek Youth Camp was a facility for the developmentally challenged. She
15 again made no effort to verify the truthfulness of this part of the statement in her
16 political advertisement. Notice of Administrative Charges, page 4.

17 Even if everything the Director claims were true, he has not provided a basis for a finding of
18 malice. The Director does not even allege that Dr. Rickert acted with knowledge of falsity. His sole
19 basis for claiming that Dr. Rickert acted "with reckless disregard as to truth or falsity, is that she did
20 not further research or verify information she remembered from her conversations with Mr. Wood.

21 To establish "reckless disregard as to truth or falsity," it is not enough to show that "a
22 reasonably prudent man would have . . . investigated before publishing. There must be sufficient
23 evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth
24 of his publication." *Herron*, 112 Wash.2d at 775, quoting *St. Amant v. Thompson*, 390 U.S. 727,
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1 730-731, 88 S.Ct. 1323, 1325-26, 20 L.Ed.2d 262 (1968). A finding of actual malice "requires
2 evidence that the publisher was plagued with serious doubts as to the truth of the statement. Mere
3 failures to investigate or mistakes made in an investigation leading to a news story will not prove
4 recklessness." *Alpine Industries*, 114 Wash. App. at 394. A "public figure's critics have no
5 affirmative duty to search out the truth or to substantiate their statements, nor are they required to
6 corroborate their sources' information." *Margoles v. Hubbard*, 111 Wash.2d 195, 205, 760 P.2d 324
7 (1988), quoting *Herron v. Tribune Pub'g Co.*, 108 Wash.2d 162, 171, 736 P.2d 249 (1987), citing
8 *Garrison v. Louisiana*, 379 U.S. 64, 79, 85 S.Ct. 209, 218, 13 L.Ed.2d 125 (1964). Not even a
9 scintilla of evidence has been presented on which to base a conclusion that Dr. Rickert "was plagued
10 with serious doubts as to the truth" of her statement. The Director merely asserts that Dr. Rickert
11 could have investigated the matter more thoroughly. The law of the United States and of the State of
12 Washington specifically declines to impose such a burden on the speech of a critic of a public figure
13 pertaining to a matter of public importance.

14 If anything, the standard for a finding of malice in the context of RCW 42.17.530(1)(a) is
15 even higher than in the context of a defamation lawsuit. In *119 Vote NO!*, Justice Talmadge, the
16 most severe critic of the majority opinion, reasoned that RCW 42.17.530(1)(a), as then written,
17 should be held to withstand Constitutional challenge because of the protections for political speech
18 provided by its requirement that a statement be proved to have been made with "actual malice"
19 before a violation could be found. 135 Wash.2d at 640, Talmadge, J., concurring. He reasoned that
20 the need to prove actual malice in such cases meant:

21 The scope of RCW 42.17.530(1)(a) is severely proscribed. It does not reach
22 hyperbole or rhetoric, polemic or beguiling commentary, satire or mockery, zealotry
23 or insanity, insincerity or low cunning, true beliefs or mere mistakes. . . . The statute
24 speaks only to one person: the calculating liar, who with clear mind and steadfast,
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MARILOU RICKERT
1805 PIONEER WAY
SHELTON, WA 98584
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1 deliberate purpose, coldly composes and diligently distributes knowing lies to effect a
2 desired political result. The statute chills only this devious liar, not free speech. In
3 short, "The actual malice test penalizes only the 'calculated falsehood.'" *Id.* at 648-
4 649, quoting *Tavoulareas v. Washington Post Co.*, 567 F.Supp. 651 (D.D.C.1983).

5 Even if true, the Director's allegations that Dr. Rickert "made no effort to ascertain the
6 authenticity of her statements" or verify their truthfulness, does not even begin to sustain a finding
7 that she is a "calculating liar, who with clear mind and steadfast, deliberate purpose, coldly
8 compose[d] and diligently distribut[e] knowing lies."

9 c. The State has not met its burden of proof.

10 Any violation of RCW 42.17.530 must "be proven by clear and convincing evidence." This
11 is a higher standard of proof than the "preponderance of the evidence" standard required in most civil
12 actions. A mere "'scintilla' of evidence, evidence that is 'merely colorable,'" or evidence that lacks
13 significant probative value is not enough. *Ilerron*, 108 Wash.2d at 170; *Alpine Industries*, 114
14 Wash.App. at 389; *Eubanks v. North Cascades Broadcasting*, 115 Wash.App. 113, 125, 61 P.3d
15 368. In his concurring opinion in *119 Vote NO!*, Justice Talmadge relies on the statute's requirement
16 that violations be proved according to "the intermediate standard of proof, clear and convincing
17 evidence," for the protection of political speech by making "violations more difficult to prove." 135
18 Wash.2d at 640.

19 To prove that Dr. Rickert violated RCW 42.17.530(1)(a), the State must prove, by clear and
20 convincing evidence, that the statements at issue were facts, that they were material, that they were
21 false, that they were about a candidate for public office, and that the statements were made by Dr.
22 Rickert with actual malice. Dr. Rickert has acknowledged making the statements and that they were
23 made about Senator Sheldon, a candidate for public office. As to the remaining matters to be
24 proven, the State cannot meet its burden of proof on the basis of the evidence presented.
25

1 The State has not proven by clear and convincing evidence that the statements at issue were
2 statements of fact. The statements with which the State takes issue are that Mission Creek Youth
3 Camp was a "facility for the developmentally challenged" and that Senator Sheldon "voted to close"
4 it.

5 RCW 72.05.010 refers to Mission Creek Youth Camp as one of several named "residential
6 state schools, camps and centers" with the purpose of providing "for every child with behavior
7 problems, mentally and physically handicapped persons, and hearing and visually impaired children .
8 . . such care, guidance and instruction, control and treatment as will best serve the welfare of the
9 child or person and society . . ." Mission Creek has been variously described as a "youth
10 rehabilitation center" (Dave Wood), a "medium security Youth Camp for juveniles convicted of
11 felony-level offenses" (Ken Brown, Fiscal and Contracts Manager, Juvenile Rehabilitation
12 Administration, Washington State Department of Social and Health Services), and a "prison facility
13 for juvenile offenders" (Senator Tim Sheldon), as well as a "facility for the developmentally
14 challenged" (Dr. Marilou Rickert). All of these statements are characterizations. None of them rise
15 to the level of fact. The fact that Dr. Rickert changed her characterization of Mission Creek after
16 discussing the matter with Senator Sheldon and Mr. Wood is not evidence that her initial
17 characterization was a "false statement of material fact." Furthermore, it certainly does not meet the
18 "clear and convincing" standard.

19 With regard to the statement that Senator Sheldon "voted to close" Mission Creek, Senator
20 Sheldon asserts that the fact that he voted against the budget that eliminated funding for the
21 operation of Mission Creek means he did not vote to close Mission Creek. Mr. Wood believes
22 otherwise. "Tim's vote AGAINST his own party's budget sealed Mission Creek's fate. Claiming to
23 have voted against the budget that eliminated Mission Creek, ergo he was against closure, is the kind
24 of lie that politicians with little principle are so fond of." Wed., 6 Nov. 2002, e-mail from Dave
25

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1 Wood to Marilou Rickert. The significance of Senator Sheldon's vote against ESSB 6387 with
2 regard to Mission Creek is a matter of opinion, not fact. The fact that Dr. Rickert determined that
3 her statement may have led to confusion among the public and took steps to clarify it does not
4 change the fact that it was opinion, not fact. The State has not met its burden of proof on this issue.

5 The State has not presented any evidence at all that the statements were "material," indeed
6 they have not even provided a definition of "materiality" with regard to alleged facts in political
7 advertising. The Director states that:

8 Both parties agreed that support for social services was an important issue to voters
9 in this district. The statement in the advertisement drew a sharp contrast between
10 Senator Sheldon and his opponent, Ms. Rickert. It attempted to cast Senator Sheldon
11 in an unfavorable light concerning his handling of social service issues.

12 Notice of Administrative Charges at page 4.

13 If this is the State's evidence as to the issue of "materiality," it not only fails to meet
14 the "clear and convincing standard," but it is contrary to law. First Amendment protections
15 extend to speech that is critical of public officials. *New York Times*, 376 U.S. 254, 270;
16 *Margoles*, 111 Wash.2d at 203. "Vehement, caustic, and sometimes unpleasantly sharp
17 attacks on government and public officials" are permitted. *Margoles at Id.*, quoting *New*
18 *York Times at Id.*

19 As the State has not proven that the statements at issue are statements of fact, the State cannot
20 prove that the statements are "false." In his concurring opinion in *Vote NO!*, Justice Talmadge notes
21 that "[i]n construing a similar statute, Oregon courts have consistently held that a statement that can
22 in any way be inferred to be either factually correct or a mere opinion is not prohibited by Oregon's
23 statute, even though it could also be interpreted as a false factual statement." 135 Wash.2d at 655
24 (citation omitted).

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1 Finally, the State has presented insufficient evidence to prove that Dr. Rickert made the
2 statements "with actual malice." As set forth above, if it is to prove actual malice, the State must
3 present clear and convincing evidence that Dr. Rickert entertained serious doubts as to the truth of
4 the statements at the time she distributed them. The State cannot present this evidence because it has
5 does not have it. In her letter to the Director, Dr. Rickert denied knowing that any statements she
6 made were false or that she recklessly disregarded their truth or falsity. December 23, 2002 letter of
7 Marilou Rickert to Philip E. Stutzman at page 1. She also identified Mr. Wood as the source of her
8 information about Senator Sheldon's vote to close Mission Creek December 23, 2002 letter at page
9 2. Dr. Rickert repeated this information to the State's investigator, Sally Parker, on March 10, 2003.
10 Report of Investigation, pages 6-7. Nevertheless, neither Ms. Parker nor any other agent of the State
11 contacted Mr. Wood about this matter in the course of their investigation. It is impossible for the
12 State to ascertain the reasonableness of Dr. Rickert's reliance on her source, much less present "clear
13 and convincing evidence" that she entertained serious doubts about the information derived from
14 source, without even so much as consulting that source.

15 With regard to Dr. Rickert's characterization of Mission Creek as a "facility for the
16 developmentally challenged, once again the State did not even investigate the reasonableness of Dr.
17 Rickert's belief. In her investigative report, Ms. Parker states that "PDC staff conducted a telephone
18 interview with Ken Brown, Fiscal and Contracts Manager with the Juvenile Rehabilitation
19 Administration, a division of the Department of Social and Health Services," who "stated to PDC
20 staff that MCYC has been a medium security Youth Camp for juveniles convicted of felony-level
21 offenses since the 1960's." Report of Investigation at page 8. Mr. Brown further informed PDC
22 staff "that some of the offenders incarcerated at MCYC may have had reoccurring disorders such as
23 developmentally disabled, [*sic.*] but treatment of those disorders was not the purpose of the facility."
24 *Id.*

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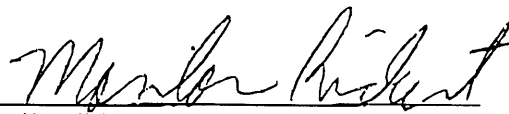
1 It appears that the State did not contact anyone who had worked at Mission Creek, had
2 program responsibility for Mission Creek, or had any knowledge as to what, if any, percentage of the
3 youth served by Mission Creek suffered from developmental disabilities or what, if any,
4 accommodation was provided for them. In other words, the State did nothing to determine the
5 reasonableness of Dr. Rickert's belief that Mission Creek was a "facility for the developmentally
6 challenged." Mr. Brown's characterization of Mission Creek as "a medium security Youth Camp for
7 juveniles convicted of felony level offenses" and his information that treatment of developmentally
8 disabilities "was not the purpose of the facility" does even begin to meet the State's burden of proof
9 that Dr. Rickert's statement was made with actual malice.

10 4. Conclusion

11 RCW 42.17.530(1)(a), on its face, violates the First Amendment of the Constitution of the
12 United States in that it infringes on the First Amendment's guarantee of free speech. Even if the
13 statute survives Constitutional challenge, Dr. Rickert has not violated the statute. The State has
14 applied an incorrect standard for a finding of actual malice under RCW 42.17.530(1)(a) as defined in
15 RCW 42.17.505(1) and has not met the clear and convincing burden of proof necessary to support its
16 conclusion that a violation of RCW 42.17.530(1)(a) has occurred. The charges of the Director of
17 Compliance of the Public Disclosure Commission against Dr. Rickert should be dismissed in their
18 entirety.

19 DATED this 22^d day of May, 2003.

20 Respectfully submitted,

21 
22
23 Marilou Rickert, Respondent



BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

IN THE MATTER OF ENFORCEMENT
ACTION AGAINST

Marilou Rickert,
Respondent

PDC CASE NO: 03-147

DECLARATION OF MARILOU
RICKERT

MARILOU RICKERT, under penalty of perjury under the laws of the State of Washington,
declares as follows:

1. I am over eighteen years of age and competent to testify herein. I have direct knowledge of the facts below.
2. I was a candidate for the position of State Senator from Washington's 35th Legislative District in the November 5, 2002 General Election. Senator Tim Sheldon was my opponent. Senator Sheldon was the incumbent and was re-elected.
3. Between October 16, 2002 and October 28, 2002, I sponsored a mailing that was either mailed or delivered to most active voting households in the 35th District. The mailing consisted of a brochure with information about the Green Party and my candidacy enclosed in a wrapper, entitled "There IS a Difference," comparing Senator Sheldon's positions with my own on various issues. A copy of the entire mailing is attached. I sent the mailings out in batches over an extended period of time because the mailings had to be prepared by volunteers and because I had to raise the money to pay for the mailings. Invoices for the mailing and a copy of my letter to Sally Parker of April 1, 2003, with particulars about the mailing schedule and supporting detail is attached. In order to save money, I did not send the mailing to Senator Sheldon, myself, or any voters who I believed were already committed to Senator Sheldon or me.

AFFIDAVIT OF MARILOU RICKERT—Page 1

Marilou Rickert
1805 Pioneer Way
Shelton, Washington 98584
(360) 432-0272

- 1 4. I had sources for all of the statements I made about Senator Sheldon. For the most part, my
2 sources were from the print media. Other sources included PDC records, records of the
3 Washington state legislature, statements made by Senator Sheldon himself at candidates
4 forums that we both attended and of which I had direct knowledge, and information received
5 from Dave Wood, a lobbyist for Action for RHCs (Residential Habilitation Centers), an
6 advocacy group for services for the profoundly and severely developmentally disabled.
7 Specifically, Mr. Wood and I discussed Senator Sheldon's role in the closure of Mission
8 Creek Youth Camp over lunch in June of 2002 and by telephone on at least one occasion
9 thereafter.
- 10 5. All of the statements in the mailer about Senator Sheldon had to do with his activities as state
11 senator and senatorial candidate. At no point in my campaign for the State Senate did I make
12 any statement or sponsor any advertising that contained any reference to Senator Sheldon's
13 personal life, his family, or his activities as PUD commissioner, Director of the Ma
14 County Economic Development Council, manager and part owner of Sheldon Properties, or
15 any position or role other than that of state senator and senatorial candidate.
- 16 6. The Friday before the election (November 1, 2002), Senator Sheldon telephoned me at my
17 work place. He said that he had just been made aware of the mailing and that it was false and
18 misleading in its entirety. Initially, he took specific issue with the statement that he "wants to
19 terminate people from Washington's Basic Health Plan." I pointed out that his position
20 regarding termination of people from Washington's Basic Health Plan had not only been
21 reported in the press, but that he had twice advanced it at public forums at which I had been
22 present.¹

23 ¹ On March 14, 2003, Senator Sheldon voted to pass SSB 5807, which would significantly
24 restrict enrollment in Washington's Basic Health Plan for both adults and children. A copy of
25 the Senate Bill Report and Roll Call Vote of the 3rd Reading and Final Passage of SSB 5807 is
attached.

1 7. After a somewhat heated discussion, Senator Sheldon agreed that the statements about him in
2 the mailer were substantially true, with the single exception of the statement that he "voted to
3 close a facility for the developmentally challenged in his district." Senator Sheldon insisted
4 that he voted against closure of Mission Creek and specifically stated, in response to my
5 question, that he considers himself "an advocate for the developmentally disabled." I agreed
6 to review the information with my source (Mr. Wood) and get back to Senator Sheldon.²

7 8. I contacted Mr. Wood regarding Senator Sheldon's accusation that the statement that he
8 "voted to close a facility for the developmentally challenged in his district" was false. Mr.
9 Wood discussed the matter with me face to face on Election Day and also sent me an e-mail
10 message (attached) to the effect that my only error was reporting Mission Creek as a facility
11 for the developmentally challenged rather than a youth rehabilitation center³ and that Senator
12 Sheldon's vote AGAINST his own party's budget sealed Mission Creek's fate. Mr. Wood
13 went on to say that "Two Republican senators, Alex Deccio and Shirley Winsley, saved or
14

15 ² To the best of my knowledge and belief, Senator Sheldon made no attempt to contest my
16 statement regarding his role in the closure of Mission Creek, despite the fact that he had the
17 resources and (even assuming that he only became aware of the mailing two weeks after the
18 beginning of its distribution) time to do so. Senator Sheldon collected \$109,970 in campaign
19 contributions, of which he surplused \$59,404.37. Copies of Senator Sheldon's record of
20 contributions and expenditures from the PDC are attached. For an example of the speed with
21 which a political message can be aired, KMAS, Shelton's local radio station, taped an ad for my
22 campaign on less than two hours notice the Friday before the election and had it on the air in
23 less than 24 hours. To the best of my recollection, \$200 bought six weekend airings of the ad.

24 ³ Mission Creek has been variously described as a "youth rehabilitation center" (Dave Wood), a
25 "medium security Youth Camp for juveniles convicted of felony-level offenses" (Ken Brown,
Fiscal and Contracts Manager, Juvenile Rehabilitation Administration, Washington State
Department of Social and Health Services), and a "prison facility for juvenile offenders" (Senator
Tim Sheldon), as well as a "facility for the developmentally challenged" by me. RCW 72.05.010
refers to Mission Creek Youth Camp as one of several named "residential state schools, camps
and centers" with the purpose of providing "for every child with behavior problems, mentally
and physically handicapped persons, and hearing and visually impaired children . . . such care,
guidance and instruction, control and treatment as will best serve the welfare of the child or
person and society . . ."

1 even expanded programs in their districts that they care deeply about. They voted YES on
2 the budget. Tim could have done the same thing."

3 9. As Mr. Wood copied his email to Senator Sheldon and told me he would speak directly with
4 Senator Sheldon about the Mission Creek matter (and told me the week following the
5 election that he had done so), I did not contact Senator Sheldon further about Mission Creek,
6 although I did send him a card congratulating him on his re-election.⁴

7 10. On the weekend following the election, I received a letter from Senator Sheldon (attached)
8 in which he stated that "[y]our excuse that I want to terminate people ineligible to be enrolled
9 from the BHP as somehow justified because, in your words, 'they are people, too' is truly
10 lame." Senator Sheldon also threatened to "pursue the issue with the PDC" if I did not
11 provide him "with the date and bill number of the legislation that . . . would have closed . . .
12 'a facility for the developmentally challenged in his district and is advocating for the site to
13 be turned into a prison.'"⁵ The letter was followed by several phone calls from Senator
14 Sheldon to my home over the long Veterans Day weekend. On Veterans Day, Senator
15 Sheldon voluntarily left a message on my voice mail to the effect that he wanted me to write
16 a letter to the press clarifying the matter. I have saved Senator Sheldon's message and can
17 arrange for it to be replayed from any telephone.

18 11. Upon learning that Senator Sheldon had no objection to a wider public airing of the dispute,
19 and would actually welcome such an airing, I immediately took the opportunity to both

20 ⁴ Senator Sheldon won re-election to the State Senate with 78.27% of the votes cast (29,221 to
21 8,109). A copy of the Washington Secretary of State's final election results for the General
22 Election, November 5, 2002, State Legislature - District 35 is attached

23 ⁵ "Youth Camp Could Be Resurrected as Prison," The Bremerton Sun, July 11, 2002,
24 (attached), names Senator Sheldon as the organizer of a meeting to discuss a proposal "to
25 convert the recently closed Mission Creek Youth Camp into a minimum-security facility for men
or women". Senator Sheldon is quoted as supporting the proposal because "it's a good fiscal
move by the state."

1 correct any misunderstanding that may have been caused by my mailing and also inform
2 advocates for the developmentally disabled that Senator Sheldon may be sympathetic to their
3 cause by sending the attached letter to the *Shelton-Mason County Journal*, *The Bremerton*
4 *Sun*, *The Olympian*, and *The Daily World*. The letter was published in its entirety by the
5 *Journal* on November 21, 2002, and in shortened form by the *Sun* on December 2, 2002, and
6 the *Olympian* on December 9, 2002. Copies of all publications of the letter are attached. To
7 the best of my knowledge, *The Daily World* chose not to publish the letter.

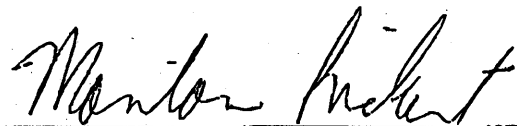
8 12. The weekend after I sent my letter to the press, I received a second letter from Senator
9 Sheldon (attached) re-iterating his request that I clarify my statement in a letter to the press.
10 Senator Sheldon attempted to impose additional requirements by insisting that I send the
11 letter to "all the daily and weekly newspapers in the 35th District" and that he "would have to
12 agree to the content of the letter." I did not receive Senator Sheldon's second letter until after
13 I mailed my letter to the press, but I would not have cooperated with an attempt by a
14 government official acting in his official capacity to impose a prior restraint on political
15 expression. I believe that Senator Sheldon was acting in his official capacity as State Senator
16 when he demanded I send a letter to the press containing political content over which he
17 would have control because the e-mails Senator Sheldon sent in support of his statement that
18 he voted against closure of Mission Creek were self-identified as having been circulated
19 during regular work hours among State Senate staff who researched the matter for him.
20 Copies of the e-mails are attached.

21 13. On November 18, Senator Sheldon filed a complaint with the PDC alleging that I violated
22 RCW 42.17.530(1)(a). Letter attached. I received a letter from the PDC in late December
23 notifying me of Senator Sheldon's complaint. I have fully cooperated with the PDC's
24 requests for information. On May 5, 2003, the Director filed a 'Notice of Administrative
25

1 Charges," alleging that "there is clear and convincing evidence that Marilou Rickert violated
2 RCW 42.17.530(1)(a) with reckless disregard as to truth or falsity when she distributed
3 political advertising that made a false statement of material fact about Senator Tim Sheldon."
4 I received the Notice on May 12, 2003.

5 I AFFIRM under penalty of perjury under the laws of the State of Washington that the
6 forgoing is true, complete, and correct.

7 DATED this 22nd Day of May, 2003, at Shelton, Washington.

8
9 
10 MARILOU RICKERT